Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC (ARB)-21–06 OF 2012
MARY LIM J
19 MARCH 2013

Arbitration — Award — Application to set aside — Parties entered into project — Disputes arose — Termination of employment before completion of project — Matter brought to arbitration — Whether Arbitral Tribunal made errors in arbitral award — Whether applicant's rights substantially affected — Whether Arbitral Tribunal considered all evidence — Arbitration Act 2005 s 42

The plaintiff had appointed the defendant to carry out and complete a centralised cold room and processing plant at Tanjung Manis, Sarawak ('the project'). However, disputes arose in the course of the project. Subsequently, the plaintiff sent warning letters to the defendant on their supposedly slow work progress. The relevant notice was the last notice and this notice was faxed to the defendant and its receipt was acknowledged by the defendant. The plaintiff terminated the employment of the defendant before the completion of the project. Subsequently, the defendant issued a notice of arbitration and an arbitrator was appointed. The arbitration granted the final awards of: (i) a total sum of RM2,947,635.511 in respect of the defendant's claims; (ii) interest at 4% pa on the said sum from the date of the award till realisation; and (iii) costs of the arbitration including all out-of-pocket expenses and the fees paid to the arbitrator as the arbitrator's costs. The plaintiff's counterclaim and set-off were rejected by the Arbitral Tribunal. The Arbitral Tribunal further delivered a corrective award where the earlier award was corrected to RM3,531,883.51. The plaintiff invoked s 42 of the Arbitration Act 2005 ('the Act') and contended that the Arbitral Tribunal had made certain errors in the arbitral award which substantially affected the plaintiff's rights concerning: notices of default and determination; notice for loss and expense; head office expenses under loss and expense; costs of rectifying defects; suspension of works; value of unfixed materials; and costs. It was suggested that the Arbitral Tribunal did not consider most of the earlier warning letters to be within the meaning of a notice of default but instead found the notices only as being potentially first tier notices to remedy the default under the termination provision of cl 51(a).

Held, dismissing the application with costs of RM40,000:

(1) From the award, it was evident that the Arbitral Tribunal had carefully

ploughed through the extensive submissions of both parties and had summarised them fairly well. There was ample factual evidence before the Arbitral Tribunal and the Arbitral Tribunal was entitled to come to the conclusions that it did. That conclusion or view was not one that was so abhorrent in law that it was not sustainable. The Arbitral Tribunal chose one over the other and reasons were given. To still prescribe such a specific mode was actually a deliberate choice (see paras 38 & 49).

(2) Notices of default and determination were not a question of law but clearly involved a finding of fact. When the Arbitral Tribunal concluded that the 14 days stipulated in the notice did not require strict observance because of the deployment of the words 'a reasonable time', it did so after it had examined and made its findings on the clause in its entirety and after considering its effects. It was not a focus on a particular portion of the clause at all. The Arbitral Tribunal was really trying to see what the letter amounted to; and he concluded that it was not a notice. The Arbitral Tribunal was perfectly entitled to proceed in the manner that it did and its approaches and interpretations were not at all contrary to principles of law (see para 54).

(3) The Arbitral Tribunal noted that the non-compliance of cl 44 which provided for loss and expense caused by delays was not raised by the plaintiff. With this, the Arbitral Tribunal did not proceed further to discuss the matter. This approach by the Arbitral Tribunal was correct. Its jurisdiction was defined by the pleadings and issues put before the Arbitral Tribunal. The court could not see how any inconsistency might be said to have arisen. In any case, the Arbitral Award involved factual findings which rendered the award unsuitable for scrutiny by the court under s 42 of the Act (see para 61).

(4) In matters concerning the award of damages, the Arbitral Tribunal had applied the correct principles of law. It was entirely a matter of discretion depending on whether there was sufficient proof. From the terms of the award, it was clear that the Arbitral Tribunal was satisfied with the evidence adduced. The court was not sitting in an appellate capacity to rehear the merits of the claim. It only determines any questions of law that arose from the award. All the questions posed were not in fact questions of law; neither are any of the questions dealing with quantum. The court must resist replacing its views for that of the Arbitral Tribunal's which the parties had freely chosen to determine their dispute in the first place (see para 67).

(5) The question of proving a claim and whether the burden was indeed discharged in any given circumstances necessarily entailed examination and evaluation of the evidence. It was the Arbitral Tribunal's duty to evaluate the evidence presented, and to accord to such evidence the appropriate weight and value; and to make the necessary inferences. The

Arbitral Tribunal has done that and it would be highly irregular for the court to intervene for the reasons suggested by the plaintiff (see para 70).

(6) On the matter of costs, the plaintiff's complaint was that since the defendant had only succeeded partially, the costs awarded should also be partial costs only. The award on costs was not one which was not countenanced in law. Frequently, in proceedings before the court, costs which generally follow the event were tempered by the court depending on the peculiar circumstances of the case. It was not unknown or unheard of for the court to not even award any costs even to successful parties or to make such parties pay costs. Costs were a matter of discretion and the quantum was a matter of proof. These matters were adhered to and the court would refrain from interfering (see paras 71–72).

(7) The court did not find any single reason or instance where the Tribunal had answered issues posed not against the relevant factual material that was placed before it by the parties. On the contrary, the Arbitral Tribunal had carefully evaluated the evidence presented and applied the correct principles of law. Certainly, it had not made any obvious errors in the principles, their application or in the conclusions reached. All the questions posed purportedly of law were far from being of such character, especially the questions in relation to the various heads of claim. These matters necessarily require findings of fact by the Arbitral Tribunal and which were 'fact sensitive'. In this case, it was amply evident that the Arbitral Tribunal had competently and adequately conducted that inquiry before drawing conclusions (see para 75).

[Bahasa Malaysia summary

Plaintif telah melantik defendan untuk melaksana dan menyelesaikan bilik sejuk berpusat dan tapak pemprosesan di Tanjung Manis, Sarawak ('projek tersebut'). Walau bagaimanapun, pertikaian timbul semasa pelaksanaan projek tersebut. Berikutan itu, plaintif telah menghantar surat-surat amaran kepada defendan berhubung prestasi kerja mereka yang dikatakan lembab. Notis berkaitan merupakan notis terakhir dan notis ini telah difaks kepada defendan dan penerimaannya telah diakui oleh defendan. Plaintif telah menamatkan pekerjaan defendan sebelum projek siap. Berikutan itu, defendan telah mengeluarkan notis timbang tara dan seorang penimbang tara telah dilantik. Penimbangtaraan telah memberikan award-award muktamad untuk: (i) jumlah keseluruhan RM2,947,635.511 berkaitan tuntutan-tuntutan defendan; (ii) faedah pada 4% setahun atas jumlah tersebut dari tarikh award hingga realisasi; dan (iii) kos timbang tara termasuk semua perbelanjaan sendiri dan bayaran kepada penimbang tara untuk kos penimbang tara. Tuntutan balas dan penepian plaintif telah ditolak oleh Tribunal Timbang Tara. Tribunal Timbang Tara selanjutnya telah menyampaikan award pembetulan di mana award terdahulu telah diperbetulkan kepada RM3,531,883.51. Plaintif telah membangkitkan s 42 Akta Timbangtara 2005 ('Akta tersebut') dan berhujah

bahawa Tribunal Timbang Tara telah membuat kesilapan tertentu dalam award timbang tara yang sebahagian besarnya menjejaskan hak-hak plaintif berkaitan: notis-notis kegagalan dan penentuan; notis-notis untuk kerugian dan perbelanjaan; perbelanjaan ibu pejabat di bawah kerugian dan perbelanjaan; kos memperbaiki kecacatan; penggantungan kerja; nilai bahan-bahan yang tidak dipasang; dan kos. Adalah dicadangkan bahawa Tribunal Timbang Tara tidak mengambil kira kebanyakan daripada surat-surat amaran terdahulu dalam maksud notis kegagalan tetapi sebaliknya mendapati notis-notis itu hanya sebagai notis-notis peringkat pertama yang berpotensi untuk meremedikan kegagalan di bawah peruntukan penamatan iaitu fasal 51(a).

Diputuskan, menolak permohonan dengan kos sebanyak RM40,000:

(1) Berdasarkan award itu, adalah jelas bahawa Tribunal Timbang Tara telah meneliti dengan terperinci hujah-hujah ekstensif kedua-dua pihak dan telah meringkaskan hujah-hujah tersebut dengan baik. Terdapat keterangan mencukupi di hadapan Tribunal Timbang Tara dan Tribunal Timbang Tara berhak untuk membuat kesimpulan sebagaimana yang dilakukannya. Kesimpulan atau pendapat tersebut bukan suatu yang sukar diterima dari segi undang-undang sehingga ia tidak boleh dikekalkan. Tribunal Timbang Tara memilih salah satu daripada yang lain dan sebab-sebab telahpun diberikan. Untuk masih menetapkan cara spesifik adalah sebenarnya pilihan yang sengaja dibuat (lihat perenggan 38 & 49).

(2) Notis-notis kegagalan dan penentuan bukan persoalan undang-undang tetapi jelas melibatkan penemuan fakta. Apabila Tribunal Timbang Tara memutuskan bahawa 14 hari yang ditetapkan dalam notis itu tidak memerlukan pemerhatian ketat kerana penggunaan perkataan-perkataan 'a reasonable time', ia lakukan selepas memeriksa dan membuat penemuannya berhubung fasal itu secara keseluruhan dan setelah mengambil kira kesannya. Ia tidak langsung memberi fokus tentang sebahagian tertentu fasal itu. Tribunal Timbang Tara sememangnya cuba melihat apa yang dimaksudkan surat itu; dan beliau memutuskan bahawa ia bukan suatu notis. Tribunal Timbang Tara memang berhak untuk meneruskan dalam cara yang dilakukannya dan pendekatan serta interpretasinya sama sekali tidak bertentangan dengan prinsip-prinsip undang-undang (lihat perenggan 54).

(3) Tribunal Timbang Tara menyatakan bahawa ketidakpatuhan fasal 44 yang memperuntukkan untuk kerugian dan perbelanjaan disebabkan oleh kelewatan tidak bangkit oleh plaintif. Dengan ini, Tribunal Timbang Tara tidak meneruskan selanjutnya untuk membincangkan perkara itu. Pendekatan ini oleh Tribunal Timbang Tara adalah betul. Bidang kuasanya ditafsirkan oleh pliding-pliding dan isu-isu yang

dikemukakan di hadapan Tribunal Timbang Tara. Mahkamah tidak dapat melihat bagaimana apa-apa yang tidak konsisten mungkin dikatakan telah timbul. Dalam apa-apa keadaan, award Timbang Tara melibatkan penemuan fakta yang menyebabkan award itu tidak sesuai untuk diteliti oleh mahkamah di bawah s 42 Akta tersebut (lihat perenggan 61).

(4) Dalam perkara-perkara berkaitan award ganti rugi, Tribunal Timbang Tara telah menggunapakai prinsip-prinsip undang-undang yang betul. Ia sememangnya suatu perkara tentang budi bicara bergantung kepada sama ada terdapat bukti yang mencukupi. Berdasarkan terma-terma award itu, adalah jelas bahawa Tribunal Timbang Tara berpuas hati dengan keterangan yang dikemukakan. Mahkamah tidak bersidang dalam kapasiti rayuan untuk mendengar semula merit-merit tuntutan itu. Ia hanya menentukan apa-apa persoalan undang-undang yang timbul daripada award itu. Semua persoalan yang dikemukakan pada hakikatnya bukan persoalan undang-undang; mahupun terdapat apa-apa persoalan berkaitan kuantum. Mahkamah perlu menolak untuk mengubah pendapatnya dengan pendapat Tribunal Timbang Tara yang mana pihak-pihak telah dengan bebas memilih untuk menentukan pertikaian mereka pada mulanya (lihat perenggan 67).

(5) Persoalan membuktikan tuntutan dan sama ada beban sememangnya dilepaskan dalam apa-apa keadaan yang diberikan perlu pemeriksaan dan penilaian keterangan. Adalah kewajipan Tribunal Timbang Tara untuk menilai keterangan yang dikemukakan, dan memberikan keterangan itu beban dan nilai yang sesuai; dan untuk membuat inferens yang perlu. Tribunal Timbang Tara telah melakukan sedemikian dan ia agak di luar aturan untuk mahkamah campur tangan bagi sebab-sebab yang dicadangkan oleh plaintif (lihat perenggan 70).

(6) Berhubung kos, aduan plaintif adalah oleh kerana defendan hanya berjaya sebahagiannya, kos yang diawardkan juga patut sebahagian kos sahaja. Award berhubung kos bukan suatu yang tidak disetujui dari segi undang-undang. Seringkali, dalam prosiding di hadapan mahkamah, kos yang biasanya menurut kejadian diubah oleh mahkamah bergantung kepada keadaan tersendiri kes itu. Ia bukan suatu yang tidak diketahui atau tidak didengar untuk mahkamah tidak memberi award untuk apa-apa kos bahkan kepada pihak-pihak berjaya atau untuk membuat pihak-pihak tersebut membayar kos. Kos suatu perkara mengikut budi bicara dan kuantum adalah suatu perkara berkaitan bukti. Perkara-perkara tersebut perlu dipatuhi dan mahkamah enggan campur tangan (lihat perenggan 71–72).

(7) Mahkamah tidak mendapati satu pun sebab atau keadaan di mana Tribunal itu telah menjawab isu-isu yang dikemukakan bukan terhadap material faktual berkaitan yang dikemukakan di hadapannya oleh

pihak-pihak. Sebaliknya itu, Tribunal Timbang Tara dengan hati-hati meneliti keterangan yang dikemukakan dan menggunapakai prinsip-prinsip undang-undang yang betul. Sememangnya, ia tidak membuat apa-apa kesilapan yang nyata dalam prinsip-prinsip itu, permohonan atau kesimpulan mereka. Kesemua persoalan yang dikemukakan bagi maksud undang-undang tiada kaitan langsung, terutamanya persoalan berkaitan pelbagai kepala tuntutan. Perkara-perkara berikut semestinya memerlukan penemuan fakta oleh Tribunal Timbang Tara dan yang 'fact sensitive'. Dalam kes ini, terdapat keterangan yang mencukupi bahawa Tribunal Timbang Tara dengan kompeten dan sewajarnya telah melaksanakan siasatan tersebut sebelum membuat kesimpulan (lihat perenggan 75).]

Notes

For a case on application to set aside, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1662.

Cases referred to

Antaios Compania Naviera SA v Salen Rederierna AB [1985] 1 AC 191, QBD (refd)

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Ells Tylin (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd 68 Con LR 137 (refd)

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80, HC (refd)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49; [2003] 1 CLJ 103, CA (refd)

Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd [2000] 1 MLJ 621, HC (refd)

Georgas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA (refd)

Government of Kelantan v Duff Development Company Limited [1923] AC 395, HL (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] MLJ 401; [2004] CLJ 743, FC (refd)

JM Hill & Sons Ltd v London Borough of Camden (1982) 18 BLR 31, CA (refd)

Maimunah Deraman v Majlis Perbandaran Kemaman [2010] MLJU 1711; [2011] 9 CLJ 689, HC (refd)

Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (refd)

Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)

Pembinaan LCL Sdn Bhd v SKS Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113; [2007] 3 CLJ 185, CA (refd)

Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd [2005] 2 SLR 270, HC (refd)
SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd [2004] 5 MLJ 385, HC (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Union of India v AL Rallia Ram AIR 1963 SC 1685, SC (refd)
Universal Petroleum Consent Order v Handels-und TransportgesellschaftmbH [1987] 1 WLR 1178, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 16, 17, 28, 28(1), 37, 37(a), (c), 42, 42(1), (1A), (2), (3), (4)
Arbitration Act 1979 [UK]

Belden Premaraj (Rehna Lee Perumal, Raja Ahmad Mohzanuddin Shah Raja Mohzan, Rasheed Khan Mohd Idris and Sollehhuddin Muzaid with him) (Belden) for the plaintiff.
Khoo Guan Huat (Skrine) for the defendant.

Mary Lim J:

BACKGROUND FACTS

[1] Vide letter of acceptance dated 27 December 2007, the plaintiff appointed the defendant to carry out and complete a centralised cold room and processing plant at Tanjung Manis, Sarawak ('the project'). The conditions of contract between the parties utilised the JKR standard form contract 203A Rev 10/83. The initial date of completion of the project was 10 July 2008. Disputes arose in the course of the project and the plaintiff terminated the employment of the defendant prior to the completion of the project.

[2] The defendant issued a notice of arbitration and on 13 July 2010, the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') appointed an arbitrator. The arbitration took place from 5 April 2011–10 August 2011. Written submissions were filed and on 10 May 2012, the plaintiff received a written award dated 27 April 2012. The final award was as follows:

(a) a total sum of RM2,947,635.511 in respect of the defendant's claims;

(b) interest at 4%pa on the said sum from the date of the award till realisation; and

(c) costs of the arbitration including all out-of-pocket expenses and the fees

paid to the arbitrator as arbitrator's costs with the amount to be agreed by the parties, or taxed by the arbitrator or upon application, by the High Court.

[3] The plaintiff's counterclaim and set-off were rejected by the Arbitral Tribunal. Pursuant to the parties' application and after submissions, the Arbitral Tribunal delivered a corrective award on 22 June 2012 where the earlier award was corrected to RM3,531,883.51. The corrections have no particular effect on the determination of this application.

SECTION 42 OF THE ARBITRATION ACT 2005 (ACT 646)

[4] The plaintiff has invoked s 42 of the Arbitration Act 2005 ('Act 646'). In his affidavit in support of the originating summons, Dato' Hj Mohad Khazin bin Hamzah, the director general of the plaintiff affirmed that the Arbitral Tribunal had made certain errors in the arbitral award which substantially affected the plaintiff's rights. Broadly, these errors concern the following matters:

(a) notices of default and determination;

(b) notice for loss and expense;

(c) head office expenses under loss and expense;

(d) costs of rectifying defects;

(e) suspension of works;

(f) value of unfixed materials; and

(g) costs.

[5] In respect of each matter, the plaintiff has framed what it perceived as questions of law arising from the award for the determination of this court. If the questions are answered in the plaintiff's favour, the plaintiff sought to have the award wholly or partially set aside. Alternatively, the plaintiff urged the court to vary the award or remit it to the Arbitral Tribunal for reconsideration on the terms that the court deems fit.

THE APPROACH

[6] Generally, the parties are in agreement on the approach that the court should adopt when dealing with a reference under s 42 of Act 646. By no means is the court sitting in exercise of its appellate jurisdiction. The court's jurisdiction under s 42 is somewhat limited by the defining terms in s 42 itself;

in particular sub-s 42(1), (1A) and (2) which provide:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought;

[7] Under these provisions, the plaintiff must:

(a) identify or formulate the questions of law;

(b) show how these questions of law arise from the arbitral award;

(c) show how its rights are substantially affected by these questions of law; and

(d) set out the grounds upon which the reference is sought.

[8] Sundra Rajoo & WSW Davidson in *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia* (Sweet & Maxwell Asia, 2007) commented that s 42 has no equivalent in the Model Law and that it 'is also out of line with the recent Acts in other parallel jurisdictions'. The writers also observed that s 42 overlaps with s 37; the latter allows an award to be set aside but only on the grounds found in para 37(1)(a)–(b) whereas s 42 is silent.

[9] The defendant has suggested that although s 42 has not specified the grounds, the plaintiff must nevertheless show proof of one of the grounds set out in s 37. Mr Khoo Guan Huat, learned counsel for the defendant has cited the case of *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR 270, a decision of the High Court in Singapore in support of this line of argument.

[10] While the courts generally take a limited jurisdiction approach in matters concerning arbitration and arbitral awards, it is quite different to say that s 42 is not engaged unless and until the applicant proves that its questions of law are founded on the grounds set out in s 37. If s 37 is examined, it can be seen that the grounds there are not necessarily those relating to only questions of law but instead are more of mixed fact and law. For example, grounds such as incapacity or sufficiency of notice (sub-s 37(a) and (c)).

[11] In any case, in *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering*

& Construction Co Ltd, the court was invited to set aside the arbitral award under ss 16, 17 or 28 of the Arbitration Act (Cap 10, 1985). On closer examination, it is observed that the court did not express any view to the effect that the questions of law must necessarily be founded on the same grounds available for setting aside an award and nothing else. It cannot be gainsaid that the court's views on what a question of law is of assistance. But, it must be borne in mind that the court there was addressing the issue from a different perspective; of s 28 and whether leave to appeal may be granted. In fact, Judith Prakash J made what was referred to as 'the first point', that:

> … as stated in s 28(1) of the Act, the court cannot set aside an award because there has been an error of law on the face of the award. Nor does an error of law give rise to a right of appeal. It is only when there is a question of law that arises from the award that leave to appeal is permissible. In the Northern Elevator case, the Court of Appeal (per Choo Han Teck J at [19] held:
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> > [A] question of law must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

[12] In our case, the court has been asked to exercise its jurisdiction under s 42 and this provision does not cloak the court with appellate jurisdiction. Be that as it may, it is quite apparent that the grounds identified and relied on by the plaintiff must nevertheless be capable of supporting the questions of law formulated. Now, whether the formulated questions amount to genuine questions of law is an entirely separate matter as sometimes, this is not immediately obvious. Suffice to say that I am nevertheless inclined to take a restrictive approach to s 42 in that only questions of law and not questions of fact or even mixed law and fact may be referred. This is because of the presence of s 8 which provides that:

> Unless otherwise provided, no Court shall intervene in any of the matters governed by this Act.

[13] Throughout the legislation, there are express provisions on when and how the court may intervene. Since s 37 already provides for the intervention of the court in setting aside an arbitral award, the distinction here must lie in not only the orders that the court may make (see s 42(3)– (4) where the court may order a tribunal to state its reasons or state reasons in sufficient detail), but that the court will only do so where the question referred to the court is a question of law; and not one of fact; or mixed law and fact.

[14] I am mindful that there may be instances where the questions of law

may arise from findings of fact. In those cases, the courts should be even more vigilant to ensure that no circumventions, covert or otherwise are allowed to pass. In *Russell on Arbitration* (1997) (para 8-057), the writer remarked:

> … the parties will not be allowed to circumvent the rule that the tribunal's findings of fact are conclusive by alleging that they are inconsistent or that they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question. The argument that it is a question of law whether there is material to support a finding of fact is no longer available.

[15] For a long time now, the courts have accepted that the Arbitral Tribunals' findings on facts are final and conclusive as the arbitrators are 'masters of the facts' — see *Georgas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215 at p 228. In the Federal Court's decision in *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] MLJ 401; [2004] CLJ 743, the Federal Court reiterated that an arbitral award is final, binding and conclusive and can only be challenged in exceptional circumstances. Consequently, if the arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient for the setting aside of his award as:

> [I]t would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood'.

[16] This approach has not changed with the passing of the Arbitration Act of 2005 (Act 646). In fact, I would venture to say that with the fairly comprehensive provisions of Act 646, the respect for and the adherence to the principle of party autonomy remains paramount and it permeates throughout the scheme of the legislation. Such judicious restrain is furthermore consistent with the promotion of finality in arbitral awards.

[17] Section 42 further requires the questions of law to arise out of the arbitral award. In other words, it cannot arise from the arbitration or arbitral proceedings. Again, in this, I find support from the English Court of Appeal's decision in *Universal Petroleum Consent Order v Handels-und TransportgesellschaftmbH* [1987] 1 WLR 1178 where the court was invited to exercise a more liberal approach when considering what kind of questions of law could be referred to the court. It was suggested that there was no limit to the jurisdiction of the court with the amendments to the English Arbitration Act 1979. Prior to the amendments, the court had jurisdiction to hear appeals and remissions on the ground of errors on the face of the award. This was abolished and replaced with new sub-ss (2)–(3) which are somewhat similar to s 42. This

proposition was rejected by the court with the court viewing it as 'unsound to the point of heresy'. After citing how Lord Diplock would have treated the proposition, Kerr LJ opined that the amendment in the form of the abolition of sub-s (1) 'was in no way intended to widen the jurisdiction to set aside or remit …'

[18] Further, this restrictive or limited jurisdiction approach ought to be applied only in clear and exceptional cases. The principles envisaged are akin to 'error on the face of the award' and this was adopted by the Privy Council in the case of *Government of Kelantan v Duff Development Company Limited* [1923] AC 395. That Privy Council decision was consistently followed in a long line of cases spanning almost the last 40 years and determined at the appellate levels. See the cases of *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; *Hartela Contractors Ltd v Hartecon JV Sdn Bhd* [1999] 2 MLJ 481; [1999] 2 CLJ 788; *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49; [2003] 1 CLJ 103; *Pembinaan LCL Sdn Bhd v SKS Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113; [2007] 3 CLJ 185; and *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791.

[19] This view was shared by Ariff Yusof J (as he then was) in *Maimunah Deraman v Majlis Perbandaran Kemaman* [2010] MLJU 1711; [2011] 9 CLJ 689. His Lordship took the view that arbitral awards should not be easily interfered with. Quoting from his own previous decision in *Majlis Amanah Rakyat v Kausar Corporation Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766, His Lordship stated:

> error on the face of the award should continue to apply under s 42 — in the accepted sense that 'the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance'
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> The resolution of this action had also to proceed on the basis that the law supported a limited jurisdiction on the part of the High Court to intervene, but lack of appraisal of the law and the evidence was not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal.
>
> There had to be a 'serious failure' to analyse and appraise 'material' and 'relevant' evidence … 'The weight of evidence and inferences from it are essentially matters for the arbitrator'. Further, I was obviously mindful of the first principles that this limited jurisdiction should be exercised only in 'exceptional circumstances' and should be confined to arbitral errors and not appellate errors, in the sense that the court should not concern itself with the mere merits or correctness of the arbitrator's decision.

[20] His Lordship opined that a 'failure to consider relevant governing principles of law will therefore be an instance of an arbitrator applying

principles of construction which the law does not countenance, which is an established instance of an error if law on the face of the award'. Such an error would then be opened to correction as an arbitral error.

[21] Therefore, what amounts to an error of law on the face of the award will include instances where the arbitral tribunal had proceeded illegally or, had applied principles of construction which are not countenanced in law, as are alleged here.

[22] In the present proceedings, I find that the procedural requirements specified in s 42 have been complied. The plaintiff has formulated a host of what it perceived to be questions of law in each of the seven respects mentioned. As mentioned earlier, whether these questions merit judicial intervention is another matter altogether.

[23] The defendant has resisted this application on three main grounds. In summary, the defendant maintained that the 'questions allegedly to be of law have been correctly decided by the arbitrator'. Next, the plaintiff submitted that 'the questions have been wrongly formulated by the plaintiff in that the plaintiff had misquoted and/or selectively quoted the arbitrator's findings in the Award'. Finally, the defendant maintained that these 'questions formulated even though couched in law, must necessarily relate to a review of the arbitrator's assessment of the evidence and/or are factual findings by the arbitrator'. In short, the respondent submitted that the application ought to be dismissed because the arbitral award was perfectly in accord with the principles of law at play; and s 42 is not engaged.

THE 14 QUESTIONS OF LAW POSED

[24] 14 questions have been posed alleging that the Arbitral Tribunal has erroneously and inconsistently construed contractual provisions in the contract that are not countenanced by law. Broadly, these questions arise from the plaintiff's complaints of the Arbitral Tribunal's decision in relation to:

(a) the notices of default and determination under cl 51 of the conditions of contract;

(b) the notices for loss and expense;

(c) the defendant's claim for head office expenses under 'Loss and Expense'; cost for rectifying defects; suspension of works; and value of unfixed materials; and

(d) the award on costs.

[25] The 14 questions are as follow:

Notices of Default and Determination

(i) Whether the applicable legal principles in Malaysia is that the stipulated mode of service of notices of default and determination in clause 51 of the Conditions of Contract is merely directory rather than obligatory, particularly in the case where the Plaintiff has utilized a more efficient mode of service and the Defendant's early receipt of the said notices was expressly admitted by the Defendant.

(ii) Whether a reference to a specific number of days in the notice of default dated 28.1.2009 in accordance with clause 51 of the Conditions of Contract negates or qualifies any mention of 'reasonable time'.

(iii) Consequential upon the above, whether the Arbitral Tribunal was wrong at law in concluding that the notice of default dated 28.1.2009 and the notice of determination dated 10.2.2009 were defective and/or unlawful

Notice for Loss & Expense

(iv) Whether in view of the Arbitral Tribunal's construction of strict compliance of clause 51 of the Conditions of Contract, a consistent or similar construction ought to have been given to clause 44 of the Conditions of Contract such as to require strict compliance with the requirement for service of notice of intention to claim loss and expense.

(v) Whether the Arbitral Tribunal erred in law by failing to apply a consistent legal interpretation or construction towards clause 44 of the Conditions of Contract as it did for clause 51 of the Conditions of Contract.

(vi) Consequently, whether the Arbitral Tribunal erred at law in ignoring the Defendant's failure to comply with clause 44 of the Conditions of Contract.

(vii) Further, whether the defendant's failure to comply strictly with clause 44 of the Conditions of Contract, as a matter of law and a matter of pure construction, ought to have led the Arbitral Tribunal to conclude that the defendant was not entitled to claim loss and expense.

Head Office Expenses under Loss & Expense

(viii) Whether the Arbitral Tribunal having rejected the defendant's claim for head office expenses for being too general and vague, was entitled as a matter of law to ignore its own findings and award the defendant expenses for fees to officers and personnel based in the head office (under item 2 of Schedule/CWS-1A).

Cost for rectifying works

(ix) Whether as a matter of law, the plaintiff had discharged its burden of

proving the cost incurred by the plaintiff to rectify the defects in the defendant's works by adducing the full contract awarded by the plaintiff to the substitute contractor (which included a specific cost for the remedial works in respect of defects).

(x) Consequently, whether the Arbitral Tribunal ought, as a matter of law, have allowed the plaintiff the set-offs claimed.

Suspension of Works

(xi) Whether the Arbitral Tribunal is entitled as a matter of law to award loss and expense for the period of 18.7.2008 to 22.9.208 when there were no works performed by the defendant and who had demobilized from the site.

Value of Unfixed Materials

(xii) Whether the Arbitral Tribunal having outrightly rejected the defendant's Interim Claim Nos. 7 and 8, was entitled as a matter of law to ignore its own findings and award a sum for unfixed materials at site premised on the Defendant's Interim Claim Nos. 7 and 8.

(xiii) Alternatively, whether the Arbitral Tribunal, as a matter of law, was entitled to award the defendant a sum for unfixed materials at site based on the defendant's Interim Claim Nos. 7 and 8 when the sum so awarded included for unfixed materials at site that had been assigned to a 3rd party and paid by the plaintiff to the 3rd party.

Costs

(xiv) Whether in view of the fact the defendant only partially succeeded in its claim in the arbitration, the costs awarded to the defendant ought as a matter of law to be an award for partial costs only.

Questions 1–3

[26] The first three questions are inter-related and stem primarily from cl 51(a) of the conditions of contract which reads as follow:

51. Determination of Contractor's Employment

(a) Without prejudice to any other rights or remedies which the Government may possess, if the Contractor shall make default in any one or more of the following respects that is to say:

(i) if he without reasonable cause suspends the carrying out of the whole or any part of the Works before completion, or

A

(ii) if he fails to proceed regularly and diligently with the Works, or

(iii) if he fails to execute the Works in accordance with this Contract or persistently neglect to carry out his obligations under this Contract, or

B

(iv) if he refuses or persistently neglects to comply with a written notice from the S.O. to remove and replace any defective work or improper materials or goods, or

(v) if he fails to comply with the provisions of Clause 27(a) and (b) hereof;

C

then the S.O. may give to him a notice by registered post or by recorded delivery specifying the default, and if the Contractor shall either continue such default for fourteen (14) days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the Government may thereupon by a notice sent by registered post or by recorded delivery determine the employment of the Contractor under this Contract.

D

[27] What happened was this. The plaintiff sent warning letters to the defendant on supposedly their slow work progress on 31 March 2008, 15 April 2008, 15 September 2008, 9 January 2009 and 28 January 2009. The relevant E notice was the last notice. This notice was faxed to the defendant and its receipt was acknowledged by the defendant. It was suggested that it was wrong for the Arbitral Tribunal to have ignored this fact without considering the common sense business approach in the interpretation of such clauses. It was also suggested that the Arbitral Tribunal did not consider most of the earlier F warning letters to be within the meaning of a notice of default under cl 51(a); but instead found the notices of 15 September 2008 and 28 January 2009 only as being potentially first tier notices to remedy the default under the termination provision of cl 51(a).

G

[28] The plaintiff's arguments are important and I shall set them out in some detail. Mr Belden Premraj, learned counsel for the plaintiff contended that the Arbitral Tribunal ignored the notice of 15 September 2008 and focused its attention only on the notice of 28 January 2009. This latter notice was then found to be in breach of cl 51(a) because its strict requirements had not been H complied with. Clause 51(a) required a notice of default to be sent by registered post or recorded delivery specifying the default. If the default continued for 14 days after receipt of the notice, then the defendant here may send a notice by registered post or recorded delivery determining the employment of the plaintiff under the contract. Because the notice of 28 January 2009 was not I sent by registered post, the Arbitral Tribunal found such non-compliance as rendering the notice, defective. That being so, the subsequent determination was also improperly issued because it was subject to and consequent upon the first tier notice of 28 January 2009. Under such conditions and circumstances, the Arbitral Tribunal found the determination unlawful.

[29] Learned counsel contended that the Arbitral Tribunal's decision premised on a strict compliance of cl 51(a) of the conditions of contract relied on the decision in *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157. It was this strict approach which was criticised and alleged to be no longer the overriding principle when dealing with the mode of service. It was the plaintiff's submission that 'whilst the said decision in *Nirwana* does express a requirement for strict compliance with the termination in cl 51, the decision must be looked at in the context of the facts of the case and the alleged 'lax' compliance in failing to stipulate the breach in the said notice'. Learned counsel contended that when the decision in *Nirwana Construction* was examined carefully, it will be seen that 'there was no actual consideration by the Court of Appeal as to the mode of service of the said notice since that was not the issue in the said case'.

[30] Learned counsel meticulously combed and distinguished the several cases to put forth that argument. He contended that the Arbitral Tribunal was being restrictive in its interpretation and, had read or misread the authorities cited to him. The critical decisions examined by the plaintiff were the decisions of *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 and *SK Styrofoam Sdn Bhd v Pembinaan LCL Sdn Bhd* [2004] 5 MLJ 385. He submitted that in *Fajar Menyensing*, the High Court chose to rely on the 11th edition of *Hudson's Building and Engineering Contracts* Vol 2 at p 1244 and the Australian and Singapore case law, applying thereby what he called 'a slavish strict mandatory approach to the mode of service prescribed in the contractual clause even though English case law states to the contrary'.

[31] It was argued by learned counsel for the plaintiff that the later decision of the High Court in *SK Styrofoam* ought to be preferred. According to learned counsel, the court had analysed the law and the related decisions from all jurisdictions including the decision in *Fajar Menyensing* before pronouncing that a more business commonsense approach to interpretation of such clauses should be applied. The court held that a notice that was delivered by hand was deemed valid even though the contract required service by registered post.

[32] Although this decision was overturned on appeal, the plaintiff argued that upon close examination, it would appear that the High Court's view of a common sense approach to interpreting clauses when it relates to the mode of service of the notice of default was not reversed by the Court of Appeal. This common sense approach is said to have been adopted in England and is now a trend — see *JM Hill & Sons Ltd v London Borough of Camden* (1982) 18 BLR 31; *Ells Tylin (known as Dalkia Technical Services Ltd) v Co-operative Retail Services Ltd* 68 Con LR 137, and *Antaios Compania Naviera SA v Salen*

Rederierna AB [1985] 1 AC 191. Even authors such as *Hudson's Building and Construction Contracts* ((12th Ed), para 8-09 p 1118) have come to prefer or 'accept' this approach.

[33] It was further submitted that since the purpose of the notice was to ensure that the contractor was duly warned and to avoid any dispute between the parties as to whether such notices were actually received or as to the date of receipt; 'there is no sensible reason' why where a mode of service used equally provided such a warning and which was 'not in dispute as in this case' here, the mode should then be construed as invalid.

[34] In short, the plaintiff complaint is about the Arbitral Tribunal's use of a mandatory literal and strict approach to the construction of cl 51(a) without considering the business common sense approach to such a construction.

[35] Further, according to the plaintiff, had the Arbitral Tribunal 'realised that the strict mandatory compliance with the mode of service prescribed in clause 51(a) was no longer the overriding principle'; and instead applied the principle of common sense approach, then it would have been evident to the Arbitral Tribunal that the plaintiff had actually received the notice; had the opportunity to issue its reply; and that no prejudice had been suffered by the plaintiff/defendant. The Arbitral 'Tribunal's error of law in not applying the present trend and the legal principles currently adopted by the Malaysian Courts has substantially affected the rights of the plaintiff. For this reason, the award ought to be set aside or remitted for reconsideration by the Arbitral Tribunal.

[36] In response, the defendant argued that the Arbitral Tribunal had not erred in law. The Arbitral Tribunal's finding for a strict adherence to cl 51 was according to legal precedent and upon a factual finding that the plaintiff had not in fact adhered to cl 51(a). This failure was fatal as it resulted in rendering the notice ineffective. Mr Khoo further submitted that the Arbitral Tribunal's view in this respect found support in the Court of Appeal as seen in its decision reported in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113.

[37] Learned counsel for the defendant added that the Arbitral Tribunal did not find the notices of default and determination bad or flawed on the ground of non-compliance of cl 51 alone. It had also made findings of fact and of law on several other grounds as can be seen from paras 39–40, 42, 44 and 46 in the arbitral award.

[38] With respect, I must disagree with the plaintiff. From the award, it is evident that the Arbitral Tribunal had carefully ploughed through the extensive

submissions of both parties and had summarized them fairly well. The relevant parts of the Award are from paras 27–45; with the Arbitral Tribunal pointing out that he had found the plaintiff 'in breach of Clause 51 (a) for the reasons set out above in paragraphs 35–44':

Notice to Remedy

27. I shall now address the issues of the Notice to Remedy under Clause 51(a) of the Contract.

28. The factual positions with regards to the various notices are as follows.

29. The first warning letter as contended by the Respondent was issued by the Respondent on 31.03.2008. I read this letter to be merely a letter written by the Respondent inferring the Claimant that if the work in progress does not exceed 40%, a default notice will be issued. This letter was issued by RW1. On the 15.4.2008, a second warning letter was issued again informing them a default notice will be issued. Again, this letter is written by RW1.

30. On the 15.09.2008, (see Bundle of Translated Documents - P15), a notice was issued by the Ketua Pengarah of the Respondent, the S.O. for the project. The letter by its 3rd paragraph requires the Claimant to carry out the work with faster speed, and if this is not done within 14 days, the Contract shall be terminated. On the 19.01.2009, Warning Letter No 11 was given by RW1. This again is an unauthorized notice. Thus, I consider the letter dated 15.09.2008 to be, in effect, the 1st Notice to Remedy.

31. On the 28.01.2009, a further letter of warning was issued. Under paragraph 3 of this letter, the Claimant was required to complete the Works by 10.02.2009, and the Claimant was given 14 days or reasonable time to comply with it. This letter was sent by ordinary post and received by the Claimant on 17.02.2009. The fact that the Claimant was being given a reasonable time to comply with the warning indicates the 14 days does not require strict observance. Hence, this letter cannot be considered to be a notice as considered under Clause 51(a).

32. There is no doubt that a notice to remedy the default was a pre-requisite to determining the contract pursuant to Clause 51(c). The question whether it is to be strictly followed or can the conditions be dispensed with or relaxed?

[39] The Arbitral Tribunal then succinctly summarised the two submissions on this point at para 33:

33. The Claimant is of the view that there should be strict observance of the clause whilst the Respondent is of the view that it is merely discretionary and surprisingly also submits that the Claimant is now estopped from relying on the notice of default as they have accepted it. See paragraph 50 of their submissions.

34. I said that this is a surprising submission because the letter of the Claimant wished to challenge the notice as to its validity. I, therefore, cannot see the principle of estoppel being applied by the Respondent, and as such I will not consider all these authorities or estoppel submitted. I am of the view that the Claimant has challenged the validity of these notices correctly and, as such, I cannot see any principle of estoppel being applied.

[40] Thereafter, the Arbitral Tribunal returned 'to the issue of whether the notice that was issued was proceeded within the confines of the Contract' and; at para 35 stated that he was 'of the view that that position pursuant to this Contract is that all notices of default must be strictly adhered to'. This clause is not in any way ambiguous and as such the words should be given its plain meaning. Clause 51(a) was then examined and found to be 'mandatory requirements'. At para 37, the Arbitral Tribunal stated:

37. Hence, the requirement that it is to be sent by registered post and there will be a period of 14 days given to the contractor to remedy the defect, and if the contractor continues to default, whether previously repeated or not, a notice of determination may be sent by registered post to determine the employment. None of these warning letters were sent by registered post in any event. No evidence was advances as to why this was so.

38. Thus, the terms of the contract were not adhered to by the respondent to the letter. Parties have submitted extensively on this. I will refer to the case of *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157 at p 166 …

39. Further, at p 176 para 66 of the same judgment, which is relevant and not quite different from the present dispute where the learned judge observes that the precise ground of termination was not specified …

40. I have read the letters or warning and I conclude that it does not accord with cl 51(a). Further, it must be noted that the notice dated 28 January 2009, was not sent by registered post as required. Hence, I find the notice to remedy defective for non-compliance of cl 51(a).

41. The respondent has taken two points in their submission. These are that even if cl 51(a) has not been followed, it is not applicable anyway … and the respondent maintains that the claimant knew of these causes and, therefore, it is not prejudicial to them and thus, the notices need not be precise.

42. I cannot accept this submission to be correct for this reason. The clause requires a fresh notice for each time of default and this is specifically set out in the clause … This makes it clear that previous defaults are not in issue with each new notice. Secondly, whether the contractor knew of the defaults is immaterial. Thus, allowing the claimant to continue with the work vitiate the notices sent until 28 January 2009.

43. The last point that I wish to consider is when the period of the 14 day is to end. There seems to be some issue in this as the claimant has given

evidence that the notice was only received on the 17 February 2009, wherein the termination occurred on the 10 February 2009. This has not been seriously challenged by the respondent. This brings the issue of whether the notice of determination is now valid. This will be dealt with below.

44. The respondent has also argued that the notice even if sent would be useless because the claimant will not be able to complete within the 14 days given to remedy under the contract. This is at para 55 of their submission. I am of the view that the authorities cited by the respondent in support does not aid them. The principle adopted by the majority is that there was an impossibility of performance. This does not apply here as to the fact that there were extension of time provisions. The principle not alluded by the respondent here is that by reason of the extension of time provision, time is not of the essence and as such, this argument that they would not complete within the allocated time is irrelevant. The respondent should have examined the claimant's entitlement to extensions of time, if any, and if thought otherwise, rejected it.

45. Thus, I find the respondent in breach of cl 51(a) for the reasons set out above in paras 35–44.

46. The next question that requires consideration would be whether the notice of termination was proper. The notice of determination is contained in cl 51(a). In view of the fact that I have decided that the notice to remedy the default is not in accordance with the requirements of the contract, I therefore, am of the view that the notice of determination has not been properly issued. The notice of determination is subject to a proper notice to remedy defects and since that is defective, it is improper to rely on such notices to determine the contract. The determination of the contract is therefore, unlawful. The notice to remedy was never sent by the required procedure and therefore, the subsequent of notice of termination is defective.

[41] From the above, it can be seen that the arguments articulated today were also made before the Arbitral Tribunal. Perhaps, not in quite the same terms; but, nevertheless, the essence is the same. That the defendant knew of the notice despite it not having been sent by registered post.

[42] On the question of the prevailing principle concerning the mode of service of the notice, the Court of Appeal in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* had actually examined the High Court's treatment of this issue. The Court of Appeal referred to three authorities which unanimously concluded that the High Court 'in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction' — *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, *Union of India v AL Rallia Ram* AIR 1963 SC 1685, and *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd*. It then

went on to say that from the 'language employed in the learned judge's judgment it may be readily gathered that he was treating the application before him as though it were an appeal'. Some passages of the High Court's judgment on the notice of termination were set out (see pp 120 (MLJ); 196–198 (CLJ)) with the Court of Appeal concluding that the High Court had '… misconstrued the law and has posed the same wrong question again to himself'.

[43] A careful reading of the Court of Appeal's decision will show that the court did not leave the question there but at pp 118–119 (MLJ); 196 (CLJ), went on to observe that the arbitrator had held that 'the notice of termination of the contract offended the terms of the contract and the common law'. The arbitrator then found the notice of termination to be invalid. The Court of Appeal said that 'It was at this target that learned counsel for the respondent concentrated his attack upon when supporting the judgment under appeal'. After setting out the arbitrator's determination of the two opposing approaches of 'exact meticulous compliance' and 'business common sense', the Court of Appeal found that the High Court had accepted the respondent's criticism that the arbitrator had committed errors of law in adopting the approach or principle of a 'professional business sense' as against 'business common sense'.

[44] At pp 124 (MLJ); 204 (CLJ), the Court of Appeal further observed that:

> [16] The points on which the learned judge faulted the arbitrator for having committed an error of law are at best — although I do not say that they amount to — appellate errors, that is to say, errors of the kind that usually lead a Court of Appeal to interfere with a decision at first instance. They are not arbitral errors as explained in the authorities already cited. *Intellek Timur Sdn Bhd v Future Heritage Sdn Bhd* is an example of an arbitral error. There, the Federal Court set aside the award because the arbitrator:
>
> > … was more concerned with the issue as to whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the respondent's conduct in sending the notice and is so doing had, on principles of construction, erroneously construed the provisions of cl 26(1)(a).

[45] Specifically, on the approach adopted by the arbitrator, the Court of Appeal made these strong and clear remarks at pp 124 (MLJ); 205 (CLJ):

> … No doubt, the arbitrator held the notice of termination to be contractually flawed. In so doing, he took a strict constructionist approach. And there are many authorities which support such a view. See for example, *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 …

[46] It would appear that the High Court's view on how to approach notices of termination, whether to apply a 'professional business sense' or 'business common sense' ought not to be construed in the way proposed by the plaintiff as the Court of Appeal itself had considered the arbitrator's decision and drew the above observation. The Court of Appeal had the perfect opportunity to express its preference or approach but bearing in mind its jurisdiction in arbitration matters, it chose to make those remarks which I similarly adopt here.

[47] Given that there is indeed a body of authorities that prefer the strict approach and that such approach was not rejected by the Court of Appeal in *Pembinaan LCL Sdn Bhd v SK Styrofoam*, the Arbitral Tribunal cannot be said to have committed an error and applied a principle of law that was not countenanced by law. On the contrary, the principle of law and approach adopted was permitted and recognised by the law. Even Faiza Tamby Chik J at the first instance in *Styrofoam* recognised this when quoting from his own earlier decision in *Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd* [2000] 1 MLJ 621 where His Lordship had said:

> There is an 'error of law on the face of the award', if the arbitrator refers to evidence that is not legally admissible. It is an error if principles of construction not countenanced by the law are applied, there is also an 'error of law on the face of the award' if the arbitrator applies principles not permitted or recognised by the law.

[48] Furthermore, this construction was fact sensitive and not merely based on what the plaintiff claimed as prevailing or overriding principles on this issue. This, too, was recognised by the Court of Appeal in *Pembinaan LCL Sdn Bhd v SK Styrofoam*, where the court said at pp 124 (MLJ); 205 (CLJ), 'This is a fact sensitive finding'.

[49] As seen from the passages cited earlier (see paras 39–40, 42, 44 and 46 of the award), there was ample factual evidence before the Arbitral Tribunal on this and the Arbitral Tribunal was entitled to come to the conclusions that it did. That conclusion or view is not one that is so abhorrent in law that it is not sustainable. There are two views, even now. The Arbitral Tribunal chose one over the other and reasons were given. In fact, I would venture to say that in this day and age, to still prescribe such a specific mode is actually a deliberate choice. In such circumstances, the Arbitral Tribunal was perfectly entitled to come to the conclusions that he did.

[50] The upshot of this is that the question(s) said to be question(s) of law are in fact not questions of law alone but of mixed fact and law; which is quite outside the purview of s 42. In any case, as pointed out, the construction given by the Arbitral Tribunal is not one not countenanced by law.

[51] In dealing with the second aspect of the notice which concerned the number of days to remedy the default that had been identified, the Arbitral Tribunal found that the fact that the defendant was given an option meant that the plaintiff had effectively rendered the 14 days stipulated in the notice ineffective or no longer a period for strict observance. In other words, the Arbitral Tribunal found that with such content, the 'letter cannot be considered to be a notice as considered under clause 51(a)'. The letter was flawed and could not be a valid notice under the contract.

[52] The plaintiff's complaint here is that the Arbitral Tribunal had 'failed to construe clause 51(a) in its entirety and instead focused only on one portion of clause 51(a) which speaks of the 14 day requirement'. The plaintiff proceeded to give its construction of cl 51(a); that when construed in its entirety, it was clear that insofar as the remedial period was concerned:

(a) the period need not be stipulated in the notice given to the defendant;

(b) the period for the exercise of the determination must be at a minimum of 14 days after the defendant had received the notice and continues to be in default; and

(c) the determination could only be exercised at any period (undefined and unstipulated) after the 14 days from the receipt of the notice had expired if the default was repeated.

[53] With such a reading, the plaintiff's use of the words 'or within reasonable time' after specifying 14 days merely spelt out options available to the plaintiff; it did not 'in any way negate or make the minimum 14 days period ineffective'. Learned counsel further submitted that under cl 51(a) the option was the plaintiff's and the risk of whether the plaintiff would exercise its right upon the 14th day or any reasonable period thereafter was 'a risk borne by the defendant by virtue of the terms under cl 51(a)'.

[54] In my view, this is again not a question of law but clearly involved a finding of fact as evident from para 31 where the Arbitral Tribunal found that the letter of 28 January 2009 could not be taken as a notice under cl 51(a). When the Arbitral Tribunal concluded that the 14 days stipulated in the notice did not require strict observance because of the deployment of the words 'a reasonable time', it did so after it had examined and made its findings on the clause in its entirety and after considering its effects. With respect, it was not a focus on a particular portion of the clause at all. The Arbitral Tribunal was really trying to see what the letter amounted to; and he concluded that it was not a notice. The Arbitral Tribunal was perfectly entitled to proceed in the manner that it did and its approaches and interpretations are not at all contrary to principles of law.

[55] With these questions answered in the defendant's favour, it follows that the determination is also invalid as was properly decided by the Arbitral Tribunal.

QUESTIONS 4–7

[56] Moving on to questions 4–7, the questions actually concern cl 44 which reads as follow:

> 44. Loss and Expense Caused by Delays
>
> If the regular progress of the Works or any part thereof has been materially affected by reason as stated under Clause 43 (c), (f) or (i) hereof (and no other), and the Contractor has incurred loss and expense for which he would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within one (1) month of the occurrence of such event of circumstance give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to Clause 43 hereof.

[57] The first issue raised by the plaintiff is about the non-compliance of cl 44. Under this clause, a claim must first be referred to the SO before it can be considered. It was not. It was raised for the first time in the arbitration.

[58] According to the plaintiff's submission, this claim for loss and expense should then not have been allowed since the defendant did not give any notice; and certainly none within the time period stipulated. The criticism here is that the Arbitral Tribunal did not apply the same strict interpretation that it did when considering cl 51(a). Instead, the Arbitral Tribunal is said to have 'selectively apply a strict construction of contractual requirements for some clauses of the contract and not others, even though both clauses are worded similarly in terms of the requirements to be fulfilled by either party'.

[59] The Arbitral Tribunal is said to have casted the onus on the plaintiff for not having objected to the claim. This was submitted as an inconsistency and an error of law meriting disturbance of the award as it resulted in the defendant being awarded a claim for loss and expense despite its non-compliance while the plaintiff was penalised for its non-compliance.

[60] The defendant's response is simply this — there was no plea in the pleadings and the plaintiff should be barred from raising this now.

[61] Having examined the award, I agree. The Arbitral Tribunal noted that the non-compliance of cl 44 was not raised by the plaintiff — para 83. With

this, the Arbitral Tribunal did not proceed further to discuss the matter. Again, this approach by the Arbitral Tribunal is correct. Its jurisdiction is defined by the pleadings and issues put before the Arbitral Tribunal. As such, I cannot see how any inconsistency may be said to have arisen. In any case, I agree with the defendant that the Arbitral Award involved factual findings which render the award unsuitable for scrutiny by the court under s 42.

QUESTIONS 8,12 AND 13

[62] On the questions posed on how the Arbitral Tribunal had dealt with the various heads of claim, (8, 12 and 13), it was the plaintiff's submission that the Arbitral Tribunal had erroneously and inconsistently applied the law of damages.

[63] Specifically, on question 8, the plaintiff submitted that when the Arbitral Tribunal rejected the defendant's claim for head office expenses on the ground that it was too general and vague; it had in fact disallowed expenses for staff salaries and office expenses. Yet, in the next breath it awarded payments for some of the head office staff, namely the project advisers, project engineer and the car rentals of these persons. Although these items had not been classified under 'head office expenses' but as 'expenses for overstaying the site', the plaintiff claimed that they were in fact expenses relating to the defendant's head office. The plaintiff then reproduced an extract of the defendant's Schedule 1 of CWS1A with the various items listed, referred to certain exhibits and the oral evidence of CW1. CW1 was the defendant's main witness and his witness statement was marked 'CWS1A'.

[64] The plaintiff argued that given these circumstances, the eighth question of law must be answered in its favour. Therefore, it was suggested that the award which included an erroneous amount of RM210,000 must be varied or remitted to the Arbitral Tribunal for reconsideration.

[65] As for the 12th and 13th questions of law, these questions are in relation to interim claims and claims for unfixed materials at site. The argument articulated is that the award included sums assigned to a third party who had already been paid by the plaintiff. The relevant parts of the award are paras 82–91.

[66] After examining the award with regard to all these matters, I note that there was extensive examination of the evidence of the witnesses as well as the related documentation before the Arbitral Tribunal drew findings of fact. Aside from this, and more fundamentally and contrary to the plaintiff's contention, the defendant's claim was actually not rejected. Instead, the Arbitral Tribunal determined the quantum on the basis of proof. As for the claim of unfixed

materials which the plaintiff had paid to third parties, the Arbitral Tribunal found it proved on the facts. This is quite evident from the award.

[67] In matters concerning the award of damages, the Arbitral Tribunal had applied the correct principles of law. It was entirely a matter of discretion depending on whether there was sufficient proof. From the terms of the award, it is clear that the Arbitral Tribunal was satisfied with the evidence adduced. This court is not here sitting in an appellate capacity to rehear the merits of the claim. It only determines any questions of law that arise from the Award. All these questions posed are not in fact questions of law; neither are any of the questions dealing with quantum. The court must resist replacing its views for that of the Arbitral Tribunal's which the parties had freely chosen to determine their dispute in the first place. The court therefore rejects these questions.

QUESTIONS 9–10

[68] The plaintiff had claimed set-offs for defective work done by the defendant. Questions 9–10 relate to how the Arbitral Tribunal treated this issue of set-offs. The plaintiff's criticism is that a different standard of proof had been applied despite the plaintiff having led evidence to prove its claim. The plaintiff alluded to the evidence placed before the Arbitral Tribunal in the form of the contract entered between itself and the replacement contractor engaged after the determination of the defendant's employment. The plaintiff claimed that the defendant's defective works were remedied by this contractor under the term 'remedial works' appearing in the relevant schedule or bill of quantities to the contract with the replacement contractor. The relevant parts of the award are paras 95–97.

[69] In the award, the Arbitral Tribunal stated that it had found the termination to be invalid. That being so, the Arbitral Tribunal concluded that set-offs for the appointment of the substitute or replacement contractor, additional claims for liquidated and ascertained damages, additional fees, consultancy fees and additional management fees could not be allowed. Further, the set-off was rejected on the basis that there was no proof of the value of the cost of the defects and when the defects were rectified; or who rectified them.

[70] In my judgment, this is quite clearly a question of fact and not of law. The question of proving a claim and whether the burden was indeed discharged in any given circumstances necessarily entails examination and evaluation of the evidence. It is the Arbitral Tribunal's duty to evaluate the evidence presented, and to accord to such evidence the appropriate weight and value; and to make the necessary inferences. The Arbitral Tribunal has done that and it would be highly irregular for this court to intervene for the reasons suggested

by the plaintiff.

QUESTION 14

[71] On the matter of costs and this is raised in question 14, the plaintiff's complaint is that since the defendant had only succeeded partially, the costs awarded should also be partial costs only. At para 104 of the award, the Arbitral Tribunal awarded 'costs to the claimant, which can be agreed upon or taxed by me or the claimant may apply for taxation in the High Court'.

[72] In coming to this decision on costs, it will become apparent that this was after the facts and the various issues posed had been dealt with. I do not see the award on costs as one which is not countenanced in law. Frequently, in proceedings before the court, costs which generally follow the event are tempered by the court depending on the peculiar circumstances of the case. It is not unknown or unheard of for the court to not even award any costs even to successful parties or to make such parties pay costs. It is entirely a matter of a proper exercise of discretion which I find guided by the facts here. In this respect, costs is a matter of discretion and the quantum, a matter of proof. These matters were adhered to and this court will refrain from interfering.

[73] Accordingly, I do not find merit in this argument and must reject the question as one appropriate under s 42 of Act 646.

CONCLUSION

[74] It is important to bear in mind that the examination of the arbitral award is not an exercise or lesson in semantics, grammar or syntax. While an award may be put under a microscope and examined in some minutiae, the scrutiny must not forget the total picture. The award should never be scrutinised mechanically or less, piece-meal. It should always be regarded in its entirety and when that is done, it can and will become explicitly clear that the Arbitral Tribunal had made the proper considerations based on correct principles of law; applied those principles consistently to the facts and finally, made findings of fact in order to answer the issues posed to the Arbitral Tribunal.

[75] I do not find any single reason or instance where the tribunal has answered issues posed not against the relevant factual material that was placed before it by the parties. On the contrary, the Arbitral Tribunal has carefully evaluated the evidence presented and applied the correct principles of law. Certainly, it has not made any obvious errors in the principles, their application or in the conclusions reached. All the questions posed purportedly of law are, in my view, far from being of such character, especially the questions in relation

to the various heads of claim. These matters necessarily require findings of fact by the Arbitral Tribunal and which are 'fact sensitive'. And, in this case, it is amply evident that the Arbitral Tribunal has competently and adequately conducted that inquiry before drawing conclusions.

[76] For all the reasons set out above and as submitted by the defendant, there are no questions of law meriting determination or intervention by the court under s 42 of Act 646. The plaintiff's originating summons is therefore dismissed with costs of RM40,000.

Application dismissed with costs of RM40,000.

Reported by Afiq Mohamad Noor